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In The Supreme Court of The United States

OCTOBER TERM, 1973

~~72-1276~~

COLEMAN OIL COMPANY, INC.,
Petitioner

v.

CITIES SERVICE OIL COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The attorneys for the Petitioner, Coleman Oil Company, Inc., on its behalf petitions for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court below (appendix, infra, pp. 21-30) is reported at 470 F.2d 925 (1972). The decision of the Trial Court, United States District Court for the District

of New Hampshire is hereto appended (appendix, infra, p. 31).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); Clayton Act 15 U.S.C. 15, § 4.

QUESTION PRESENTED

Whether a "lease" arrangement as collateral for the security for a loan, when combined with a consignment or commodity sales contract, with a Major Oil Company, Cities Service Oil Company, Respondent, engaged in interstate commerce, is such that it restrains competition for the particular sites involved, in preventing competitive fuels to be sold in violation of the statutes enumerated herein.

STATUTES INVOLVED

The relevant provisions of the statutes involved are as follows:—

Clayton Act (15 U.S.C. 14, Sec. 3.)

§ 3. Trusts in Territories or District of Columbia illegal; combination a misdemeanor

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of

Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 3, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

Sherman Act (15 U.S.C. 1, Sec. 1.)

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make

lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Sherman Act (15 U.S.C. 1, Sec. 2.)

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, or convictions thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

STATEMENT

Respondent is a corporation, incorporated under the laws of Delaware (successor by merger to Cities Service Oil Com-

pany, a Pennsylvania corporation) and having its principal office at 60 Wall Street, New York, and Petitioner is a corporation, incorporated under the laws of the State of New Hampshire, and having its principal place of business at Portsmouth, County of Rockingham, State of New Hampshire, whose mailing address is P. O. Box 657, Portsmouth, New Hampshire, 03801. The matter in controversy exceeds, exclusive of costs and interest, the sum of Ten Thousand ($10,000.00) Dollars.

Respondent is engaged in the production, manufacture, transportation and distribution of petroleum products, including but not limited to the sale of gasoline on a nation wide basis. All of the petroleum products sold by Respondent in the United States during the period of time covered in the complaint, were either produced within the United States from crude oil continuously shipped in interstate commerce to refineries located within the United States or were produced outside the United States and continuously shipped in foreign and interstate commerce into the United States.

Most of the petroleum products sold by Respondent within the United States during the period of time covered by the complaint, was sold by Respondent to distributors or directly to dealers; by distributors to other distributors and dealers; and by dealers to the public. Most of such sales involved the continuous shipment of petroleum products in interstate commerce.

Most of the petroleum products sold by Respondent within the United States during the period of time covered by the complaint, were resold by distributors and dealers under the brand name, trade marks, or trade names of Respondent.

Petitioner has engaged in the distribution and sale of petroleum products to dealers, farmers, industrial accounts. All of the foregoing classes of customers of Petitioner either resell or consume the petroleum products so sold to them.

Petitioner commenced in the business of distributing petroleum products produced by Respondent in the year 1941. Petitioner purchased petroleum products from, and also acted as a Commission Agent for Respondent under and pursuant to written contracts and resold and delivered these products under the control and direction of the Respondent.

At all times herein mentioned, Petitioner was engaged in interstate commerce and petroleum products distributed by Petitioner were purchased and sold in interstate commerce.

Petitioner in the operation of its petroleum business acquired and developed many gasoline service station sites using its moneys for the purposes of purchasing fee ownership. These sites being acquired by the Petitioner without Respondent's financial assistance, but with its consent and approval. In most instances vacant land was acquired by the Petitioner, and subsequent gasoline service station improvements were made at a considerable expenditure. These improvements were financed through and with the help of the Respondent in the following manner. Respondent would require a specific and fixed sum to improve the vacant land as and for a gasoline service station. Respondent thereupon made arrangements with a financial institution for Petitioner to borrow the said fixed sum of money with interest and amortization payable monthly on a self liquidating basis over a fifteen year period of time, the proceeds of which loan, used to improve vacant land, was secured by a first mortgage. In order to further secure said loan Peti-

tioner made, executed and delivered to the Respondent a lease for 15 years, running concurrently with said mortgage, with the monthly rental specified therein being equal to the interest and amortization on the aforesaid mortgage. The lease was thereupon assigned to the holder of the first mortgage as further collateral security. The monthly rental had no relationship to fair market value, nor to a return of investment for the Petitioner. The sole and only purpose of the lease was to secure repayment of the mortgage obligation. Respondent in turn thereupon sublet the premises direct to dealers and as a result recovered its rental obligation thereby sustaining no rental loss whatsoever. This concept in no way financially exposed Respondent but on the other hand controlled for it the specific service station site for 15 years, the basic lease term.

To further control and prevent competition from serving the site Respondent exacted first refusal options in a dollar amount, which in no way was related to the fair market value of the property but generally constituted Petitioner's cost for the property as improved.

While it is evident from the practice indicated that competition was eliminated through and as a result of said leases, it is also possible to argue that during the existence of said leases Respondent had a contingent rental obligation. However, in theory as well as in practice when the mortgage and Respondent's contingent rental liability was satisfied, as was done in this case, Petitioner demanded and should have received a cancellation of the leases in question which Respondent refused and neglected so to do.

In examining the lease arrangements between the parties,

there did not exist the true "landlord and tenant" relationship for the following reasons:—

A) The lease was used merely as a means or a conduit to assure repayment of a mortgage loan.

B) The rental specified covered the exact amount due on the mortgage, and not in excess thereof.

C) The monthly rental did not reflect a return on Petitioner's investment, or equity by its purchase of the land and other improvements.

D) It was a means for the Respondent to control a gasoline service station site, thereby eliminating competition for a period of at least 15 years.

E) In the customary landlord and tenant relationship the landlord divests itself from all interest in the site, except with respect to rental income. Insofar as the concept here is concerned Petitioner continued to supply the account with Respondent's products on a jobber or commission basis.

F) The concept developed above was solely for the purpose of enhancing Respondent's sale of petroleum products to the exclusion of all competition for the said base period of at least 15 years.

G) Respondent developed a means of selling its products through a controlled location without requiring an investment of any nature whatsoever, relying on the other hand upon the investment made by Petitioner.

H) Respondent exhibited and developed no supervision

over the location as a tenant, relying upon such supervision by the Petitioner, the fee owner.

I) The parties herein never intended the creation of a landlord and tenant relationship but merely a means for financing a particular project. Since substance prevails over form the alleged leases should be viewed as collateral security agreements, whose obligations have been satisfied and should thereby be surrendered and cancelled.

The "lease" sites, seven (7) in number are located in the States of Maine and New Hampshire.

Petitioner satisfied each of the mortgages as they related to the seven (7) service station sites, which are the subject of the litigation and thereafter accepted no further rental payments from Respondent, demanding that the said instruments in the form of a lease and given as collateral security be surrendered and cancelled.

Prior to the 14th day of December 1959 Petitioner served and acted as Respondent's Commission Agent, serving six of the seven "leased"locations and others under and pursuant to a one (1) year contract expiring on or about January 14, 1960. (Transcript Pages 117-119)

By letter dated December 14, 1959 Respondent, by its officers, agents or employees, informed Petitioner that commencing January 15, 1960, it would cease functioning as a commission agent for some fifteen stations and that Respondent would thereafter supply said stations directly; among said stations were those leased by the Petitioner to the Respondent as alleged in the complaint herein. (Exhibit B)

Petitioner faced with the problem of having no supplier to accommodate its customers and thereby faced with the fact that it would have to go out of business, had no alternative but to sign and execute the stipulation and general release referred to in the complaint (Exhibits 2 and 3) herein with the understanding that Respondent would renew with the Petitioner the commission agreement, which Petitioner so did and which agreement was in existence on a year to year basis to and including the 10th day of July, 1971.

Respondent exercised financial duress in compelling Petitioner to execute the said stipulation and general release as referred to and alleged in the complaint herein.

During the existence of the "leases" in question, and in fact prior to the creation thereof, Petitioner acted as Respondent's commission agent, serving the locations in issue, and others, with Respondent's petroleum products on a commission basis. This was evidenced by an agreement in writing for a term of one (1) year with self renewing privileges on a year to year basis.

REASON FOR GRANTING THE WRIT

The Respondent had all of the advantages of vertical integration, i.e. control through the alleged leases, without assuming any of the disadvantages—risk, insurance, workmen's compensation, unions, etc. The Petitioner, a small independent business was easy prey for the large and well organized Respondent.

In exercising such control through the alleged "lease" concept the Respondent competes against other producers through their dealers, jobbers, and commission agents rather

than directly against one another at the wholesale level. The alleged lease device is apparent in eliminating other major oil companies from competing with respect to the said leased locations. The control thus exercised through leases eliminates in the market place all competition in violation of the Federal statutes, thus making the said alleged leases in form only, properly drawn and executed, illegal.

The Court below (appendix, infra, page 22) in stating that,

> "The service stations sublet in this manner become *exclusive* outlets for the products of Cities, with Coleman acting as its wholesale distributor."

supported a decision contrary to the one it reached. In fact the decision reached by the Court below is contrary to the decision reached by the United States Court of Appeals, Ninth Circuit in *Hoopes* v. *Union Oil of California*, 374 F.2d, 480, in reversing a decision in favor of the defendant. It was found that as in this case the relationship was not that of a "landlord-Tenant". Union Oil of California had no interest in the property in the nature of a mortgage or otherwise. The state Court found that the "lease-lease back" arrangement constituted a "requirements" contract intended "to bind the owner operator to Union's product" as well as to impose a sanction in order to maintain an *exclusive outlet* for Union's gasoline. The alleged purpose, as in this case, and effect of Union's course of conduct was to foreclose competitive sales through the plaintiff's service stations. The Circuit Court in reversing the lower Court stated:—

> "It is no bar to recovery that appellants were not competitors of Union, or that appellant's injuries did

not result from the allegedly illegal restraint upon the marketing of petroleum products but rather from the means which Union used to accomplish that restraint."

Sec. 4 of the Clayton Act, 15 U.S.C. Sec. 15 reads,

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

While in *Simpson* v. *Union Oil Company*, 377 U.S. 13 (1964) rehearing denied 377 U.S. 949 the Court held at page 16,

> "There is actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market; and it matters not that the complainant may be only one merchant."

This Court further held in the Simpson case above:

> "Congress has, by legislative feat, determined that such prohibitive activities are injurious to the public and has provided sanctions allowing private enforcement of anti-trust laws by an aggrieved part. These laws protect the victims of the forbidden practices as well as the public."

The decision below is inconsistent with this Court's holding in *Simpson* v. *Union Oil Company*, supra,

"By reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose non-competitive prices on thousands of persons whose prices otherwise might be competitive. The evil of this resale price maintenance program, like that of the requirements contract held illegal by *Standard Oil Co.* v. *United States*, supra, is its inexorable potentiality for and even certaincy in destroying competition in retail sales of gasoline by theme nominal 'consignees' who are in reality small struggling competitors seeking retail gas customers." 377 U.S. at 21.

In *United States* v *Arthur Schwinn & Co.*, 388 U.S. 365 (1967) the Court declared illegal per se certain arrangements as to exclusivity. At 388 U.S. Pages 379-388 it pointed out that division and creation of territories, . . . "would violate the ancient rule against restraints on alienation and open the door to exclusivity of outlets and limitations of territory further than prudence permits." Such lease arrangements herein preventing the free flow of products in interstate commerce are thus a per se violation of the Sherman Act.

It is not necessary for the arrangement to create a monopoly. It is sufficient if the long term leases will tend to create a monopoly or have a serious adverse future impact on competition. (Kennecott Copper Corp., 39 L.W. 2669—Federal Trade Commission 1971) Thus by excluding competition through the leasing of said sites to Respondent, since no branded products could be sold other than Respondent's, the said "leases", the subject matter of the litigation herein, although correctly drawn are illegal per se and should be declared invalid.

Hoopes v. *Union Oil of California* (374 F.2d 480) (1967) it was correctly stated by the Court that a long term lease arrangement combined with other complicated arrangements, such as but not limited to the Commission or Consignment agreement herein wherein Petitioner had to exclusively serve the leased locations with Respondent's branded products, took those parties out of the landlord-tenant relationship which is the position of Petitioner. Further, ruled that Court, the fifteen year lease was illegal even though correctly drawn and executed, because its purpose was to restrain competition. Legal documents with illegal purposes are not valid was established by *Hoopes* v. *Union Oil of California*, supra.

The alleged lease arrangements, constituting the subject matter of this appeal has had and will continue to have the following effects:

A) Interstate trade and commerce in the sale and distribution of competitive petroleum products, other than Respondent's to retailers and Commission or Consignment Agents have been restrained.

B) Major oil companies have been eliminated as competitors in the marketing areas represented by the said alleged "leased" locations.

C) Dealers on the alleged "leased" locations have been foreclosed from buying competitors' petroleum products.

D) Actual and potential competition, including price competition, in the sale of petroleum products, other than those distributed by the Respondent has been eliminated.

E) Major oil companies have been eliminated as a substantial competitive factor in the free play of market forces in the determination of prices at which petroleum products are sold to dealers and retailers.

F) Respondent has obtained an undue competitive advantage over its competitors.

G) Respondent as a result of the aforesaid alleged lease arrangements is in a position to and does fix the wholesale price of its petroleum products.

From the inception of the relationship between the litigants, the Commissioner and/or Consignment agreement between them together with the lease arrangements foreclosed competition in a substantial share of the lines of commerce affected in the areas where the leased locations were situated and said agreements were in conflict with the central policy of Sec. 1 of the Sherman Act and Sec. 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in the open market. Said contracts with their substantial adverse effect upon competition were in restraint of trade in violation of Sec. 1 of the Sherman Acts 15 (U.S.C. 1) and in violation of Sec. 3 of the Clayton Act (15 U.S.C. 14).

Standard Oil Co. of California and Standard Stations v. *United States* (1949), 337 U.S. 283

FTC v. *Brown Shoe Co.* (1965), 384 U.S. 316, 319

Simpson v. *Union Oil* (1964), 377 U.S. 13

United States v. *Loew's, Inc.* (1962), 371 U.S. 38

Mytinger & Casselberry, Inc. v. *FTC* (DC Cir. 1962), 301 F.2d 534

Atlantic Refining Co. v. *FTC* (1965), 381 U.S. 351, 371
FTC v. *Texaco, Inc.* (1968), 393 U.S. 223

Dictograph Products v. *FTC* (1953), FTC DKT 5055, 50 FTC 281, aff'd 2d Cir. (1954), 217 F.2d 821, cert. denied 1955), 349 U.S. 940

Pennsylvania Water & Power Co. v. *Consolidated Gas, Electric Light & Power Co.* (4th Cir. 1950), 184 F.2d 552, cert. denied (1950), 340 U.S. 906

Red Rock Bottlers v. *Red Rock Cola* (N.D. Ga. 1952), 1952 Trade Cases Sec. 67, 375

Automatic Canteen v. *FTC* (7th Cir. 1952), 194 F.2d 433, rev'd on other grounds (1953), 346 U.S. 61

Kessler and Stern, Competition, Contract and Vertical Integration (1959), 69 Yale L.J. 1, 27.

Respondent's extension of its credit for use by the Petitioner to generate financing for the development and construction of the seven of Petitioner's service stations through the device of Respondent's taking long term base leases from Petitioner constitutes a tying arrangement wherein Respondent's petroleum products were the tied product and said extention of credit for Petitioner's use was the tying product. By that tying arrangement effected through the long term leases, Respondent did arrogate to itself sufficient control to assure that only Respondent's petroleum products would be marketed at those service station locations throughout the life of the long term leases (15 years) and any renewal periods arising thereunder. Said tying arrangements is illegal per se both under Sec. 1 of the Sherman Act (15 U.S.C. Sec. 1) and Sec. 3 of the Clayton Act (15 U.S.C. Sec. 14), as it has affected a "not unsubstantial" amount of interstate commerce and there

has been present on the part of Respondent sufficient economic power with respect to its credit, the tying product, to appreciably restrain free competition in the market for the petroleum products, the tied product. The requisite economic power can be found from either the desirability or the uniqueness of that extension of credit to so generate substantial financing, and the very existence of the tying arrangement is itself evidence of sufficient economic power. When said appreciable restraint of free competition in the market for the tied product affected a "not insubstantial", i.e. more than merely de minimis or paltry, amount of interstate commerce, the tying arrangement became unreasonable in and of itself and illegal per se.

Northern Pacific Ry. Co. v. *United States* (1958), 356 U.S. 1, 11

Fortner Enterprises, Inc. v. *United States* (1969), 394 U.S. 495, 504

Siegel v. *Chicken Delight, Inc.* (N.D. Calif.) (1970), 311 F.Supp. 847, 850

Standard Oil of California v. *United States* (1949), 337 U.S. 293, 305

International Salt Co. v. *United States* (1947), 332 U.S. 392, 396

United States v. *Loew's, Inc.* (1962), 371 U.S. 38, 45

SCM Corp. v. *Advance Business Systems & Supply Co.* 4th Cir. 1969), 415 F.2d 55, cert. den. (1970), 397 U.S. 920

Osburn v. *Sinclair Refining Co.* (4th Cir. 1960), 286 F.2d 832, cert. den. (1962), 366 U.S. 963

Signode Steel Scraping Co. v. *FTC* (4th Cir. 1942), 132 F.2d 48

Lessig v. *Tidewater Oil Co.* (9th Cir. 1964), 327 F.2d 459, cert. den. 377 U.S. 993

Industrial Building Materials, Inc. v. *Interchemical Corp.* (9th Cir. 1970), 1971 Trade Cases Sec. 73, 399

Kansas City Star Co. v. *U.S.* (8th Cir. 1957), 240 F.2d 643, 663, cert. den. (1957), 354 U.S. 923

Becker v. *Safelite Glass Corp.* (D. Kansas, 1965), 244 F.Supp. 625, 637

Continental Ore Co. v. *Union Carbide and Carbon Corp.* (1962), 370 U.S. 690, 709, 710

McCormack v. *Theo. Hamm Brewing Co.* (D. Minn. 1968), 284 F.Supp. 158.

Proof that the Respondent has violated the anti-trust laws itself constitutes proof of any requisite public injury. Even if only the Petitioner had apparently been injured, the public injury doctrine would not permit a proven violator of the anti-trust laws to escape liability.

Klor's, Inc. v. *Broadway-Hale, Inc.* (1959), 359 U.S. 207, reversing *Klor's, Inc.* v. *Broadway Hale Stores, Inc.* (9th. Cir. 1958), 255 F.2d 214.

The unlawful agreement that must be shown in a Sec. 1 Sherman Act case can be an agreement between the Respondent and the Petitioner, as to which the pari-delicto doctrine is legally insufficient to constitute a defense.

Perma Life Mufflers, Inc. v. *International Parts Corp.* 1968), 392 U.S. 134, 142

Albrecht v. *Herald Co.* (1968), 390 U.S. 145, 150 n. 6

Simpson v. *Union Oil Co.* (1964), 377 U.S. 13, reh. den. 377 U.S. 949.

The facts in the instant case also make out one or more of the following combinations, as that term appears in Sec. 1 of the Sherman Act (15 U.S.C. Sec. 1), to wit:—

a) A combination between Petitioner and Respondent, as to which the pari-delicto doctrine is legally insufficient to constitute a defense;

b) A combination between Petitioner and Respondent's dealers and customers;

c) A combination between Respondent's dealers and customers and Petitioners, as to which the pari-delicto doctrine is legally insufficient to constitute a defense.

Albrecht v. *Herald Co.* (1968), 390 U.S. 145

Perma Life Mufflers, Inc. v. *International Parts Corp.* 1968), 392 U.S. 134

United States v. *Park, Davis & Co.* (1960), 362 U.S. 29
Stanton v. *Texaco* (D.C.R. 1, 1968), 289 F.Supp. 884

Clausen & Sons, Inc. v. *Theo. Hamm Brewing Co.* (1967), 284 F.Supp. 148

Sahm v. *V-L Oil Co.* (10th Cir. 1968), 402 F.2d 69

Baker, Combinations and Conspiracies—Is there a Difference? The Anti-Trust Bulletin, Vol. XIV, Pages 71-90, Spring 1969.

Petitioner has not been precluded because of time in raising the issue of illegality as the statutes of limitations begins to run from time to time of the Respondent's last act causing the injury, which still exists since the leases in question have not been surrendered and cancelled, although the

illegality of the leases and/or contracts has openly existed for many prior years.

Zenith Radio Corp. v. *Hazeltine Research, Inc.* (1971), 401 U.S. 321.

The decision of the Court below being inconsistent and contrary to the decisions of other Circuit Courts as hereinabove set forth, and their being a substantial Federal question of law herein, the issues should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March , 1973

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 72-1250

CITIES SERVICE OIL COMPANY,

PLAINTIFF, APPELLEE,

v.

COLEMAN OIL COMPANY, INC.,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Samuel H. Borenkind, with whom *Sanderson & Dudley* and *David Sanderson* were on brief, for appellant.

Ronald L. Snow, with whom *Neil F. Castaldo* and *Orr & Reno* were on brief, for appellee.

December 19, 1972

McENTEE, *Circuit Judge*. This appeal involves the validity of seven gasoline service station leases between appellant, Coleman Oil Company (Coleman) and plaintiff, appellee, Cities Service Oil Company (Cities). Since 1941 appellant has acted as a wholesale distributor of oil products manufactured by Cities, receiving payment from the latter on a commission basis. In conjunction with this arrangement, Coleman acquired and developed numerous gasoline service station sites in the Maine-New Hampshire area, including those involved in the present litigation. While the land for these sites was acquired by Coleman with its own funds, the actual development was undertaken in cooperation with Cities. The improvements were financed

in the following manner. Cities would arrange for Coleman to borrow the necessary money from a financial institution, the loan being secured by a fifteen year mortgage on the property. As collateral security for the loan, Coleman would execute and deliver to Cities a fifteen year lease, running concurrently with the mortgage, and assign the monthly rental payments to the lending institution. These rental payments were equal to the amortization and interest due on the loan. After the service stations were completed, Cities, as lessee, would sublet the premises to a retail gasoline dealer for an amount equal to its own rental obligation. The service stations sublet in this manner became exclusive outlets for the products of Cities, with Coleman acting as its wholesale distributor.

Trouble between the two companies began in December 1959 (approximately five years after the signing of the first lease) when Cities notified Coleman that effective January 15, 1960, it would directly supply its products to fifteen service stations[1] and that, as a consequence, Coleman would no longer act as its commission agent for these stations. At about the same time, a dispute arose as to the validity of six of the seven leases now in question. This dispute culminated in an action for enforcement of the leases being filed by Cities in federal district court. As part of the settlement in that action, Coleman signed a release dated December 14, 1960, specifically reaffirming the validity of these leases, including the renewal and purchase options contained therein, and a release dated February 7, 1961, waiving all defenses to any leases then existing between the parties. In return for signing these releases, Coleman received a five year renewal of its commission agreements with Cities.

In June 1971 Coleman again notified Cities that it

[1] These fifteen service stations included six of the seven sites currently in dispute.

considered the leases to be invalid, and that it would shortly evict Cities from the leased premises. On July 10 Coleman carried out its threat, and replaced Cities' identifications with those of the American Oil Company. The present action to enforce the leases followed.

At the trial, Coleman conceded that the disputed leases had been properly executed and that Cities had never violated any of their provisions. Nor did Coleman seek to challenge the intrinsic validity of the releases which it had signed in settlement of the earlier litigation. Appellant sought to avoid the seemingly inescapable effect of these concessions, however, by arguing that the releases had been signed as a result of economic duress, and that the leases were invalid as a matter of law. As to the alleged invalidity of the leases, Coleman set forth two grounds in support of its position. First, Coleman argued that the leases had never been intended to create a genuine landlord-tenant relationship, but were rather in the nature of security agreements which should have been cancelled once the mortgage debts were paid off. Secondly, it contended that the leases were in restraint of trade, and therefore unenforceable under the Sherman Antitrust Act.

At the close of the evidence, the trial court submitted the following questions to the jury:

> (1) Were the leases between the plaintiff and defendant a deliberate arrangement by the plaintiff to eliminate and stifle competition so as to prevent competitive brands of petroleum products from being sold at the gasoline service stations covered by the leases?
>
> (2) Was the stipulation and general release, Exhibits 2 and 3, entered into by the defendant because of duress?
>
> (3) What damages do you find that the plaintiff suffered because the defendant terminated the leases on July 10, 1971?

(a) on a daily basis—
(b) from July 10, 1971, to April 7, 1972—
(c) none.

The jury answered the first two questions in the negative, and calculated plaintiff's damages to have been $250 on a daily basis. Following the jury's verdict, the trial court issued its Ruling and Order, which reads in part as follows:

"1. The findings of the Jury are accepted.

"2. The seven leases in issue are valid and binding on both parties.

"3. The seven leases in issue do not violate Section 1 of the Sherman Anti-Trust Act. 15 U.S.C. Sec. 1.

. . . .

"5. The defendant is permanently enjoined from interfering, directly or indirectly, with the plaintiff's use of the seven leased premises in accord with the terms and conditions of the leases and is ordered to specifically perform all of its obligations and responsibilities under the leases. . . .

"6. The plaintiff shall be entitled to damages at the rate of $250 per day, plus interest and costs from July 10, 1971, to date of final entry of judgment."

Coleman appeals from this decision, asserting the same grounds for finding the leases invalid as it advanced below. It also objects to the trial court's admission of certain testimony relating to damages, and to the overall sufficiency of the evidence on that issue. We find appellant's contentions to be without merit, and accordingly affirm the judgment of the district court.

The first obstacle which Coleman faces on this appeal, and one which we find to be insuperable, is the matter of the releases which it signed in late 1960 and early 1961. These releases were executed in settlement of a suit involving six

of the seven properties currently in dispute. The December 14, 1960, release specifically reaffirmed the validity of these leases, including the purchase and renewal options contained therein, and waived all defenses to their sufficiency which might be asserted by Coleman. The February 7, 1961, release contained a similar waiver of defenses as to all leases then existing between the parties. As of the signing of this second agreement, all seven leases involved in the present case had been executed.

There is an obvious public policy favoring the amicable settlement of litigation, and agreements accomplishing this result will be disregarded only for the strongest of reasons. The appellant argued before the district court, and now seeks to argue on appeal, that the releases were signed as a result of the irresistible economic pressure which Cities was able to exert upon Coleman by threatening to discontinue the commission arrangements then existing between the parties. The jury, however, found against Coleman on the issue of duress,[2] and appellant has not attempted to argue that this finding was incorrect as a matter of law. Indeed, such an argument would be fruitless, since there is no evidence in the record which would have compelled a jury to conclude that the releases had been signed as a result of economic pressure. While the president of Coleman did testify in conclusory terms that his company would have been forced to go out of business had its commission agreements with Cities been cancelled, there was no indication that other, equally profitable, arrangements could not have been worked out with competing oil companies.[3] The issue of duress was a factual question

[2] We assume, without deciding, that a defense of economic duress would have been legally sustainable on the facts of this case had the jury made an appropriate finding.

[3] Coleman also argues that it was forced to sign the releases because a discontinuation of its relationship with Cities would have deprived it of any return on its investments in the leased locations. The

for determination by the jury, and we find no reason to overturn its verdict. The releases are therefore fully binding upon Coleman, and act as a bar to the defenses it now seeks to assert. We need not rest our decision on that ground alone, however, since Coleman has advanced no sufficient reason for invalidating the controverted leases.

Turning first to appellant's contention that the disputed leases were somehow something other than what they clearly purported to be, we find the trial court's holding on the issue of the leases' validity to be completely dispositive. If the appellant's theory that the leases were actually intended as security agreements were to be accepted, the renewal and purchase options contained therein would be rendered totally meaningless. This fact alone provides more than adequate support for the court's decision.

Appellant also seeks to avoid the binding effect of the leases by arguing that they were in violation of § 1 of the Sherman Antitrust Act[4] and therefore unenforceable. Appellant reasons that since the leases effectively created an exclusive sales outlet for Cities, they illegally restrained free competition in the interstate distribution of petroleum products. We need not consider whether an antitrust defense would be available to Coleman in this contract action, see *Kelly* v. *Kosuga*, 358 U.S. 516 (1959); *Dickstein* v. *duPont*, 443 F.2d 783 (1st Cir. 1971), since more fundamental deficiencies inhere in appellant's argument.

For purposes of § 1 of the Sherman Act, a contract may

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evidence was sufficient, however, to support the conclusion that Coleman had already realized a substantial return on its investment by virtue of its commission agreement with Cities, and had additionally acquired a valuable equity interest in the properties.

[4] Coleman also argues on appeal that the leases contravened § 2 of the Sherman Act and § 3 of the Clayton Act. These sections were not raised below, and appellant is therefore precluded from relying on them here.

be an illegal restraint of trade (1) because it constitutes a *per se* violation of the statute,[5] or (2) because an

[5] Appellant attempts to characterize the lease assignment device as an illegal tying arrangement, which should be declared a *per se* violation of the Act since a not insubstantial amount of interstate commerce was affected thereby and since appellee had a sufficient degree of economic power in the tying product. *See Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969). Appellant's theory is that Cities' agreement to facilitate the construction loans through the lease assignment devices (the "tying product") was effectively made conditional upon its purchasing Cities' petroleum products (the "tied product") as sole supplier of the service stations. While appellant's argument is certainly imaginative, we do not feel that the complicated business relationships involved in this case were a tying arrangement in any real sense. The "tying product," if any, was not Cities' cooperation in the leasing arrangements, but the extension of credit by the lending institutions. Since these institutions were not subsidiaries of Cities, this case is clearly distinguishable from *Fortner, supra.* Furthermore, given that Coleman acted as a commission-basis distributor for Cities in supplying the retail operators of the leased locations, and had done so for many years before the credit was extended, for other locations in the area, we find it difficult to say that Coleman was compelled to purchase the "tied product." *Compare Fortner Enterprises, Inc.* v. *United States Steel Corp., supra; United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 (1958); *International Salt Co.* v. *United States*, 332 U.S. 392 (1947). Rather than being a coercive tying arrangement, the business relationship before us would appear to represent a rational and mutually profitable scheme for the development of service station sites.

Moreover, even assuming that the leases were, in fact, a tying arrangement, there is still no basis for appellant's argument that they constituted a *per se* violation of § 1. While we recognize that appellant need not demonstrate that Cities enjoyed a dominant market position in the tying product in order to invoke the *per se* standards of the Act, *see Fortner, supra*, appellant failed to demonstrate at trial that the credit terms offered by Cities were in any way unique and unusually advantageous. *Compare In re United States Steel Corp.*, 41 U.S.L.W. 2267 (FTC, Oct. 19, 1972). This failure to show any market power whatever in the "tying product" is fatal to Coleman's argument that the lease arrangements constituted a *per se* violation of the statute. *Compare Fortner, supra*, at 504-505.

Appellant also cites *Hoopes* v. *Union Oil Company*, 374 F.2d 480 (9th Cir. 1967) for the proposition that leasing arrangements of the kind involved in this case are illegal under the Sherman Act. While *Hoopes* is inapposite here for several reasons, it is important to note that the court in that case denied appellant's moton for sum-

unreasonable restraint of trade is either its object or effect. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953). In the present case, the jury specifically found that the leases had not been designed for the purpose of stifling free competition. Thus, since no evidence was introduced tending to show that their actual effect was to reduce competition in the relevant market area,[6] the court was clearly correct in finding no violation of the Sherman Act.

Finally, we consider appellant's claim that the evidence was insufficient on the question of damages, and that certain testimony relating to that issue was improperly admitted. Appellant first argues that the court erred in allowing the witness Tebo, an employee of Cities, to testify

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mary judgment on the grounds that exclusive dealing contracts (to which these leases admittedly bear some resemblance) are not *per se* violative of the ant'trust laws. 374 F.2d at 486. *See Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961); *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949). As we note in the text, appellant has failed to establish that the lease arrangements were "accompanied by such purpose, or had such a probable effect, as would require their condemnation" under these statutes. *Hoopes*, *supra*, at 486.

[6] Indeed, the only testimony as to the effect of the leases on competition came in the cross examination of Coleman's president:

"Q. How many different national oil and gasoline companies are represented by, would you say, by service stations in the greater Portsmouth area?

A. Well, practically every major company doing business in the east, besides the unbranded.

. . . .

Q. And, in fact, the amount of major companies represented in that area has increased since 1954 a fair amount, different brand names that are represented?

A. Oh, yes.

Q. And I think you would agree with me, wouldn't you, that the seven Citgo stations we are talking about here haven't kept any other competitive brands out of that area since 1954?

A. No, they haven't.

Q. And there is no way anyone could accuse you or the Coleman Oil Company, through the ownership of these stations, of controlling the market in the area where they are located?

A. Well, certainly not."

from the company's records as to the profits lost by the appellee as a result of its eviction from the leased locations. While conceding the general admissibility of testimony based on records kept in the regular course of business, appellant now complains that the actual documentary proof was not introduced at trial. The simple answer to this argument is that the appropriate records could have been made available for introduction into evidence upon appellant's request; its failure to make such a demand cannot now be the basis for overturning the judgment of the district court.

Appellant also objects to Tebo's testimony concerning the fair rental value of certain equipment which Cities was deprived of during the period of its eviction from the leased service stations. Appellant argues that Tebo never qualified as an expert witness on the rental value of gasoline service station equipment, and therefore should not have been allowed to testify on this aspect of appellee's damages. This argument is made, however, without citation of authority, and we do not agree that expert testimony was essential to appellee's proof on this issue. Tebo testified as to the investment value of the equipment, and this testimony provided the jury with a sufficient basis for determining its fair rental value. While the admission of Tebo's conclusions as to the equipment's rental value was perhaps improper, we do not feel that it was sufficiently prejudicial to merit reversal, especially in view of the relatively minor proportion of plaintiff's damages which this testimony involved.

Appellant's final argument concerns the sufficiency of the evidence on the damages question. The cross examination of witness Tebo revealed that he did not know whether the cost of crude oil to Cities, as reported in the company records used for calculating its loss of profits, had been determined in relation to the cost of the product from the

well head (i.e., including the cost of refining, transportation, etc.) or by some arbitrary method which would not be reflective of the oil's true cost. Appellant argues, therefore, that Cities has not established the cost of its gasoline, and has *a fortiori* failed to meet its burden of proof on the issue of damages. Under well established rules of evidence, however, a witness may testify to the contents of records kept in the regular course of business without having personal knowledge of the facts reported therein. Tebo's lack of knowledge as to the method used by appellee in calculating its own crude oil costs merely affected the weight of his testimony, and could not vitiate either its admissibility[7] or its sufficiency to sustain plaintiff's burden of proof.

Affirmed.

[7] We do not, of course, mean to imply that business records would be admissible where the entry was made upon information supplied by a person who did not have personal knowledge of the facts and a business duty to report them. *See* C. McCormick, Handbook on the Law of Evidence, § 286, at 602 (1954).

APPENDIX B

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 72-1290.

CITIES SERVICE OIL COMPANY,
Plaintiff, Appellee,

v.

COLUMBIA OIL COMPANY, INC.,
Defendant, Appellant.

JUDGMENT

Entered December 19, 1972

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk.

[cc: Messrs. Bernkind and Snow.]

FILED
MAR 17 19
MICHAEL ROBAK, JR.

No. 72-1276

In The Supreme Court of The United States

OCTOBER TERM, 1973

COLEMAN OIL COMPANY, INC.,
Petitioner

v.

CITIES SERVICE OIL COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX C

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APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Cities Service Oil Company

v. Civil Action No. 3373

Coleman Oil Company, Inc.

RULINGS AND ORDER

1. The findings of the Jury are accepted.

2. The seven leases in issue are valid and binding on both parties.

3. The seven leases in issue do not violate Section 1 of the Sherman Anti-Trust Act. 15 U.S.C. § 1.

4. The parol evidence rule does not apply to the stipulation and general release. Exhibits 2 and 3, executed December 14, 1960, and February 7, 1961. The evidence of duress and economic pressure was not an attempt to vary the terms of these instruments, but was explanatory of why they were signed by the defendant.

5. The defendant is permanently enjoined from interfering, directly or indirectly, with the plaintiff's use of the seven leased premises in accord with the terms and conditions of the leases and is ordered to specifically perform all of its obligations and responsibilities under the leases. This injunction shall become effective thirty days after the expiration of the appeal period or, if an appeal is taken, thirty days after final judgment.

6. The plaintiff shall be entitled to damages at the rate of $250 per day, plus interest and costs from July 10, 1971, to date of final entry of judgment.

Judgment shall be entered accordingly.

SO ORDERED.

/s/ [illegible]
United States District Judge

April 10, 1972

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

No. 72-1276

COLEMAN OIL COMPANY, INC.,
Petitioner

v.

CITIES SERVICE OIL COMPANY,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The jurisdiction of this Court is invoked by the petitioner under 28 USC §1254 (1).

QUESTION PRESENTED

Did the Courts below commit reversible error in accepting the findings of fact of the jury and in ruling as a matter of law that seven gasoline service station leases existing between the petitioner and respondent were valid and binding on said parties.

CORRECTIONS TO STATEMENT OF THE CASE

This is the second instance in which the petitioner, Coleman Oil Company, Inc. (Coleman), has denied the validity of

certain leases in respect of gasoline service station locations owned by Coleman, leased to the respondent, Cities Service Oil Company (Cities), and situated in New Hampshire and Maine. The case had its beginnings in December, 1959, when a dispute arose as to the validity of six of the seven leases now in question. Subsequent to the dispute, Cities filed an action in the District Court for the District of New Hampshire, seeking the enforcement of the leases. In connection with the settlement of the action, Coleman executed a release dated December 14, 1960, acknowledging the validity of six of the seven leases currently in dispute. Subsequently, Coleman executed a release and waiver of defenses dated February 7, 1961, waiving all defenses to the leases then existing between the parties, which include the seven leases currently in dispute.

This dispute between the parties again erupted in 1971, with the eviction of Cities by Coleman from the seven different gasoline service station locations leased by Coleman to Cities. Simultaneously, Cities instituted an action in the United States District Court for the District of New Hampshire, alleging that Coleman violated the terms of the seven valid leases existing between the parties and seeking a permanent injunction against interference by Coleman with the use of the leased premises and money damages for loss of profits and other consequential damages with respect to the period of time in which Cities was wrongfully dispossessed of the leased premises.

Prior to the trial, the Court denied Cities' request for a temporary restraining order and its motion for a preliminary injunction.

At the trial, Coleman admitted that the seven leases in question had been properly executed by the parties and that Cities had never violated any of their terms or conditions. The gist of Coleman's argument was that the leases were invalid as a matter of law pursuant to §1 of the Sherman Act. Further, Coleman argued that the leases were not intended to be leases and that the releases signed by Coleman were signed under duress.

The case was tried before jury on April 6 and 7, 1972. At the close of the evidence, the Court submitted the following three questions to the jury:

(1) Were the leases between the plaintiff [Cities] and defendant [Coleman] a deliberate arrangement by the plaintiff to eliminate and stiflle competition so as to prevent competitive brands of petroleum products from being sold at the gasoline service stations covered by the leases?

(2) Was the stipulation and general release, Exhibits 2 and 3, entered into by the defendant because of duress?

(3) What damages do you find that the plaintiff suffered because the defendant terminated the leases on July 10, 1971?

(a) on a daily basis —

(b) from July 10, 1971, to April 7, 1972 —

(c) none.

After deliberation, the jury answered the first two questions in the negative and determined the plaintiff's damages to be $250.-00 on a daily basis.

Shortly thereafter, the District Court found that the seven leases were valid and enforceable and issued its Rulings and Order which appears as Appendix C to the petition submitted on behalf of Coleman in this case.

Coleman appealed this decision to the United States Court of Appeals for the First Circuit. The First Circuit, in a cogent opinion, affirmed the judgment of the District Court. The appellate decision appears as Appendix A of the petition.

REASONS FOR REFUSING TO GRANT THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE DECISION OF THE COURT OF APPEALS.

A. *THE TWO RELEASES GIVEN BY COLEMAN TO CITIES CONSTITUTE A BAR TO COLEMAN'S DEFENSES.*

No substantial or unresolved federal questions are raised by the petition because the releases and waivers of defenses previously given by Coleman to Cities are dispositive of the case. Accordingly, this Court will not be required to address itself to Coleman's alleged federal claims. A review of the history of this litigation indicates that this point of view has been adopted by both the District Court and the First Circuit Court of Appeals.

The evidence at the trial established that Coleman, under advice of counsel, executed and delivered a release to Cities on December 14, 1960, in settlement of a prior action brought by Cities against Coleman to enforce the terms and conditions of six of the seven leases currently in dispute. Thereafter, a second release was executed by Coleman and delivered to Cities on February 7, 1961. The latter release was also a waiver of any and all defenses to leases existing at that time between the parties. As of February 7, 1961, the date of the second release, all of the leases which are the subject of the instant litigation had been executed and were in full force and effect.

At the trial, Coleman argued that the above releases and waiver of defenses were executed by it because of economic duress, although it conceded that the releases were executed by its president with full corporate authorization. With respect to the issue of duress, the jury, at the trial level, made a specific finding of fact that the releases were not entered into by Coleman because of duress. This finding is amply supported by the evidence which indicated that Coleman had realized a substantial return on its investment in the leased properties and had accumulated considerable equity in the sites. Moreover, Coleman was unable to establish that it could not have negotiated similarly profitable contracts with other national oil companies during the pendency of the previous litigation.

The findings of the jury on the issue of duress were accepted by the trial court. See Appendix C, paragraph No. 1. The Circuit Court of Appeals reached a similar conclusion, as follows:

> The issue of duress was a factual question for determination by the jury, and we find no reason to overturn its verdict. The releases are therefore fully binding upon Cole-

man, and act as a bar to the defenses it now seeks to assert. Appendix A, pp. 5-6.

The conclusion of the First Circuit that the releases act as a bar to Coleman's defenses is amply supported in case authority. As early as 1824, the New Hampshire Supreme Court held that a release constituted a bar to an action. *See Kimball v. Wilson*, 3 N.H. 96 (1824). Cases in other jurisdictions have reasoned that a release operates as an absolute bar. *See, e.g., Mannke v. Benjamin Moore & Co.*, 375 F.2d 281 (3d Cir. 1967); *Hoffland v. Gustafson*, 282 P.2d 1039 (Cal. 1955); and *Mangini v. McClurg*, 249 N.E.2d 386, 24 N.Y.2d 556, 301 N.Y.S.2d 508 (1969). Accordingly, the releases and waiver of defenses operate as a complete bar to the defenses asserted by Coleman.

B. *COLEMAN HAS WAIVED ITS DEFENSES BASED ON §2 OF THE SHERMAN ACT AND §3 OF THE CLAYTON ACT SINCE IT DID NOT PROPERLY RAISE AND ARGUE THESE DEFENSES AT THE TRIAL LEVEL.*

Initially, it may be helpful to focus upon the antitrust claims properly preserved by Coleman at the trial court level for argument on appeal. During the trial, the Court and counsel for Coleman engaged in the following dialogue:

> The Court: Now, Mr. Borenkind, you claim that this is illegal because, really, of the first sentence of paragraph one of section one of the antitrust act, which provides that every contract in restraint of trade or commerce among the several states or foreign nations is declared to be illegal.
>
> Mr. Borenkind: Yes.
>
> The Court: What has section two got to do with it?
>
> Mr. Borenkind: No, no, section one, the restraint of trade, and section two, contracts and conspiracy.
>
> The Court: Every person who shall monopolize or conspire with any other person, and so forth. I don't think that section two applies.
>
> Mr. Borenkind: No, it is section one.
>
> The Court: Alright.

> Mr. Borenkind: I'm sorry, I was confused as to sections one and two. *See* Record, Vol. II, pp. 167-68.

Since Coleman keyed its attack on the leases to §1 of the Sherman Act, the First Circuit concluded thusly in a footnote:

> Coleman also argues on appeal [in addition to the §1 claim] that the leases contravened §2 of the Sherman Act and §3 of the Clayton Act. These sections were not raised below, and appellant is therefore precluded from relying upon them here. Appendix A, p. 6, n.4.

It is axiomatic that, as a general rule, the Supreme Court on certiorari will not review issues not raised or properly preserved below by the petitioner. *E.g., Michel v. Louisiana,* 350 U.S. 91 (1955), *rehearing denied,* 350 U.S. 955 (1956); *Desper v. Starved Rock Ferry Co.,* 342 U.S. 187, *rehearing denied,* 342 U.S. 934 (1952); and *Lanasa Fruit S.S. & Importing Co. v. Universal Ins. Co.,* 302 U.S. 556 (1938). For example, the Supreme Court has refused to consider the merits of claims not disposed of by the Circuit Court of Appeals. *Calmar S.S. Corp. v. United States,* 345 U.S. 446, 456 (1953).

Thus, the only defense based upon the federal antitrust statutes which Coleman properly preserved is its §1 Sherman Act claim.

C. EVEN IF THE RELEASES ARE NOT A BAR TO COLEMAN'S §1 SHERMAN ACT CLAIM, THIS DEFENSE IS NOT AVAILABLE TO COLEMAN AS A MATTER OF LAW.

The petitioner in the instant case has taken the paradoxical position that seven leases, to which it has been a party for as many as seventeen years and pursuant to which it has enjoyed substantial economic benefit, are now null and void as violative of §1 of the Sherman Act. This position overlooks, however, the question of whether §1 of the Sherman Act can operate as a defense to a contract action.

The Supreme Court, in *Kelly v. Kosuga,* 358 U.S. 516 (1959), considered the following issue:

> [Whether] the petitioner's pleaded defense of illegality

> under the Sherman Act [is a defense] to this action to enforce the terms of a sale made under state law. *Id.* at 518.

It determined that such a defense was unavailable to the petitioner since:

> [i]f the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, it must be said that his theory creates a very strange class of private attorneys general. *Id.* at 520.

The Court noted that the defense of illegality under the Sherman Act was not favored by the Courts and discussed, in this regard, *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902) and *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165 (1915).

The basis for this disfavor is the possibility, such as evidenced by the case at bar, that a party to a contract would enjoy its benefits but subsequently avoid its obligations by claiming an antitrust defense. This theory was articulated in *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971), in which the First Circuit rejected a Sherman Act defense to a contract. The First Circuit reasoned:

> In this case, appellant accepted employment under the allegedly illegal contract and raised the antitrust question only when it no longer suited him to comply with his agreement. *Id.* at p. 786.

The persuasiveness of the First Circuit's reasoning in *Dickstein* becomes readily apparent in light of the factual circumstances of the instant case. In June of 1971, when Coleman claimed the leases were invalid as violative of §1 of the Sherman Act, it had enjoyed the benefits of the leases for periods ranging from twelve to seventeen years. Moreover, the president of Coleman testified at the trial that his reason for evicting Cities stemmed from a better financial arrangement offered to him by American Oil Company. *See* Record, Vol. II, at p. 104.

Assuming, then, that the releases are not a bar to Coleman's defense, its Sherman Act §1 defense is unavailable to it as a matter of law in accordance with established case authority.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER.

In its brief, the petitioner argues that the decision of the First Circuit in the instant case is in conflict with *Hoopes v. Union Oil Company of California*, 374 F.2d 480 (9th Cir. 1967) and *Simpson v. Union Oil Company of California*, 377 U.S. 13, *rehearing denied*, 377 U.S. 949 (1964). Even a cursory reading of the aforementioned decisions will lead to the conclusion that the petitioner's contention is without merit.

Prior to analyzing *Hoopes* and *Simpson*, however, a review of the business relationship between the parties would be useful. Coleman commenced the distribution of Cities products as a wholesale distributor in 1941 and received compensation based upon a commission arrangement. Some years thereafter, Coleman purchased with its own funds parcels of land which were ultimately developed as gasoline service station locations. Coleman negotiated loans from independent financial institutions to be secured by mortgages on the real estate. Additionally, Coleman executed and delivered leases of the property to Cities and assigned the lease rentals to the lender. The leases contained renewal provisions and purchase options which enabled Cities to acquire the property for a sum of money negotiated by the parties before the execution of the leases and which were incorporated into the leases. Upon completion of the improvements, the stations were sublet by Cities to service station operators. Coleman, in turn, acted as the Cities distributor to these sites and realized gain, in the form of commissions, on sales of products to the operators.

Petitioner's contention that the leases described above were not leases but rather some form of convoluted security arrangements was rejected by the District Court (Appendix C, paragraph 2) and the First Circuit (Appendix A, p. 6). The First Circuit succinctly stated its conclusion as follows:

> If [Coleman's] theory that the leases were actually intended

> as security agreements were to be accepted, the renewal and purchase options contained therein would be rendered totally meaningless. This fact alone provides more than adequate support for the court's decision. *Id.*

Coleman's position in connection with the nature of the leases constitutes a make-weight argument at best with no basis in fact.

Given the above factual situation, however, Coleman further contends that the decision below is in conflict with *Hoopes* and *Simpson*. It is fair to state that *Hoopes* has been the cornerstone of Coleman's position throughout the instant litigation. But as the First Circuit noted, *Hoopes* "is inapposite for several reasons. . . ." *Id.* at 7.

The *Hoopes* case involved an appeal by the plaintiffs, owners of a service station, of the granting of a motion for summary judgment in favor of the defendant, an oil company. The issue on appeal was whether the oil company's lease-leaseback arrangement presented a question of fact for the jury which precluded a summary judgment in favor of the oil company. The Court decided that the entry of summary judgment was premature and therefore reversed. Contrary to the contention of the petitioner in the instant case, the *Hoopes* decision did not hold illegal the lease-leaseback arrangement; the *Hoopes* court merely held that an issue of fact should have been presented to the jury. Accordingly, the precedential value of the *Hoopes* case for any proposition of substantive law is minimal.

Furthermore, in *Hoopes*, the plaintiffs, who were owners of a service station, appealed the denial of the motion for summary judgment. The Court upheld the denial on the grounds that exclusive dealing arrangements are not *per se* illegal. *Hoopes v. Union Oil Company of California*, 374 F.2d 480, 486 (9th Cir. 1967), *citing, Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 333, 335 (1961). Therefore, the *Hoopes* decision may be cited as supportive authority in opposition to petitioner's apparent legal argument.

Other distinctions between the *Hoopes* decision and the instant case can be pointed out. For example, in *Hoopes* the oil company engineered a lease-leaseback arrangement which purportedly was a restraint on trade. In the instant case, the

contracts before the Court are not lease-leaseback arrangements but standard form leases as acknowledged by Coleman's president in his testimony at trial. *See* Record, Vol. II, p. 66. Therefore, the *Hoopes* decision is not in conflict with the First Circuit decision in the instant case.

A similar conclusion is reached upon an examination of *Simpson v. Union Oil Company of California*, 377 U.S. 13, *rehearing denied*, 377 U.S. 949 (1964). In *Simpson*, a service station operator brought a private, treble damage antitrust action against its lessor, which was a national oil company. The complaint alleged that the consignment agreement between the parties, pursuant to which the plaintiff marketed defendant's gasoline, constituted an illegal resale price maintenance agreement. The plaintiff alleged that he sold gasoline at 27.9 cents per gallon although the defendant had set a minimum price of 29.9 cents per gallon. The Court concluded that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. *Id.* at p. 17.

Although the distinctions between *Simpson* and the instant case are many, the primary difference is that the danger of price-fixing was at the core of *Simpson*, while in the case at bar, no argument has been raised with respect to price-fixing or illegal resale price maintenance agreements. In *Simpson*, the thrust of the dispute was the ability of the plaintiff to sell at a price he determined to be economically feasible. In the instant case, on the other hand, the dispute revolves around the validity of seven standard-form real estate leases, without any mention by Coleman of alleged price-fixing.

Additionally, since the plaintiff in *Simpson* brought a private, treble-damage action against the defendant, the policy considerations are markedly different from the case at bar. As previously discussed, the use of an antitrust defense to a contract is not favored, and therefore, the public policy considerations are substantially changed. Accordingly, the First Circuit's decision below is not in conflict with *Simpson*.

III.

ASSUMING THE MERITS OF THE DEFENSES

ARGUED BY COLEMAN CAN PROPERLY BE REACHED, IT HAS NOT ESTABLISHED A §1 SHERMAN ACT VIOLATION.

After stating that a contract may be violative of §1 of the Sherman Act when (a) it constitutes a *per se* violation or (b) an unreasonable restraint of trade is its object or effect, the First Circuit affirmed the findings of the District Court that Coleman had not established a violation of the Sherman Act. Appendix A, pp. 7-8.

Petitioner's argument that the leases are illegal *per se* is twofold. First, it contends the leases constitute a *per se* violation of the Sherman Act because they allegedly are exclusive dealing arrangements. As was stated by the *Hoopes* court, however, "[e]xclusive dealing arrangements are not *per se* illegal." *Hoopes v. Union Oil Company of California,* 374 F.2d 480, 486 (9th Cir. 1967). *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320 (1961); *Standard Oil Co. v. United States,* 337 U.S. 293 (1949). The petitioner's position on this point is therefore in conflict with established case authority and should not merit review by this Court.

A similar result should also be reached in connection with the petitioner's contention that the leases constitute an illegal tying arrangement. *See Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495 (1969). The First Circuit rejected this "imaginative" argument and concluded that the business relationship between the parties represented "a rational and mutually profitable scheme for the development of service station sites." Appendix A, p. 7 n.5.

In order to succeed on its tying arrangement argument, the petitioner must clear three hurdles, any one of which would be fatal to its contention. First, petitioner claims that the "tying product" was the extension of credit to it by independent lenders. Petition, p. 16. Since Cities was totally unrelated to the lending institutions, the *Fortner* case is distinguishable. In reality, the extension of credit which was the alleged "tying product" was within the sole control of the unrelated lending institutions and beyond the influence of Cities. Thus, since Cities had no control or dominance over the alleged tying

product, there could be no effective pressure exerted on buyers to take the tied items. *See Northern Pacific R. Co. v. United States,* 356 U.S. 1, 6 (1958).

Secondly, the evidence indicates that Coleman has acted as a wholesale distributor of Cities Service products since 1941. Yet, the oldest lease being challenged in this action was executed on April 14, 1954. During the thirteen year period between the two aforementioned dates, therefore, Coleman supplied retail operators with Cities' products. This thirteen year period of voluntary and mutually profitable business relations between the parties certainly weakens Coleman's present contention that it was compelled to purchase Cities petroleum products (the "tied product") by reason of the availability of the extension of credit (the "tying product").

Thirdly, the First Circuit concluded that Coleman had failed to demonstrate at the trial that the credit terms offered by the independent lending institutions were in any way unique or unusually advantageous. Accordingly,

> the failure to show any market power whatever in the "tying product" is fatal to Coleman's argument that the lease arrangements constituted a *per se* violation of the statute. *Compare Fortner, supra,* at 504-05. (Citation in the original). Appendix A, p. 7 n.5.

Perhaps the most basic point to be made, however, is that the jury answered the following question in the negative:

> Were the leases between the plaintiff and defendant a deliberate arrangement by the plaintiff to eliminate and stifle competition so as to prevent competitive brands of petroleum products from being sold at the gasoline service stations covered by the leases?

The specific jury finding that no such deliberate arrangement in restraint of competition existed is an insuperable hurdle to Coleman's position that the object of the lease arrangement was an unreasonable restraint of trade.

With respect to the issue of whether the lease arrangement had the effect of an unreasonable restraint of trade, no evidence was introduced at the trial which would support Coleman's ar-

gument. To the contrary, the record reveals that competition in both the product and geographical markets increased markedly from the date of the inception of the leases. Appendix A, p. 8 n.6.

Based upon an application of the law to the record, it is submitted by Cities that, assuming Coleman's antitrust defenses can be reached, they are totally without merit.

CONCLUSION

The instant case is inappropriate for a writ of certiorari for many reasons. Initially, the petitioner is barred from asserting its antitrust defenses due to the releases and waiver of defenses it signed in settlement of the prior litigation. Assuming, however, that the releases do not constitute such a bar, the defenses are not available to the petitioner pursuant to the *Kelley v. Kosuga* decision.

In its petition, Coleman has cited no authority in conflict with the decision below. Rather, the *Hoopes* case, which is the cornerstone of the petitioner's argument, is distinguishable for several reasons and may even be cited for the proposition that exclusive dealing arrangements are not illegal *per se*.

Even if the merits of the petitioner's antitrust defenses could properly be reached, the record fails to reveal any violation of the antitrust laws. The jury considered the intent of the lease arrangements and found no anticompetitive intent. Additionally, the failure to show any market power in the alleged tying product and the undisputed evidence in the record that competition in the relevant market increased substantially leads to the inescapable conclusion that the leases in question do not violate §1 of the Sherman Act.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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